85-375

NO. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

EILEEN B. COHEN LUPERT,

Appellant,

v.

THE CALIFORNIA STATE BAR, ET AL,

Appellees.

APPEAL

FROM THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

EILEEN B. COHEN LUPERT
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Appellant PRO SE

QUESTIONS

I. WHETHER THE LEADING PRINCIPLE OF LAW WITH RESPECT TO STRICT SCRUTINY IS TO BE APPLIED IN SITUATIONS WHERE VIOLATIONS OF FUNDAMENTAL RIGHTS ARE ALLEGED.

II. WHETHER THE NINTH CIRCUIT'S HOLDING AS UNCONSTITUTIONAL THE FUNDAMENTAL RIGHTS DOCTRINE OF SECTION 1 OF ARTICLE FOURTEEN OF THE UNITED STATES CONSTITUTION ENACTED BY THE UNITED STATES CONGRESS ON JULY 28, 1868, SHOULD BE REVERSED.

III. WHETHER A STATE STATUTE NOT APPLICABLE TO ALL LIKE CITIZENS WHETHER THEY RESIDE IN THE STATE OF THE STATUTE OR IN ANOTHER OR OTHER STATES SHOULD BE STRUCK DOWN ON GROUNDS OF UNCONSTITUTIONALITY.

IV. WHETHER THE CODE OF JUDICIAL CONDUCT AT CANON 3C.(1) AND AT 28 U.S.C. CHAPTER 21, §455(a) SHOULD BE REVISED TO MORE PRECISELY DEFINE JUDICIAL PROHIBITIONS WITH RESPECT TO PRESIDING IN MATTERS WHERE CURRENT OR PREVIOUS AFFILIATIONS ARE LIKELY TO COME INTO QUESTION.

V. WHETHER THERE IS A LEGITIMATE STATE PURPOSE IN REQUIRING ALL LAW STUDENTS TO TAKE AND PASS AN ADDITIONAL BAR EXAMINATION AS OPPOSED TO REQUIRING JUST SOME LAW STUDENTS TO TAKE SUCH ADDITIONAL EXAMINATION BASED SOLELY UPON THE FACT THAT THE SOME STUDY LAW VIA A METHOD ALTERNATIVE TO THE ONE LABLED ACCREDITED.

VI. WHETHER SPECIOUS IS AN IMPROPER TERM TO APPLY TO ALLEGATIONS THAT FUNDAMENTAL RIGHTS HAVE BEEN VIOLATED.

VII. WHETHER REVERSAL BY THIS COURT'S EXERCISE OF ITS JUDICIAL POWER WOULD REMEDY THE LEGALLY INSUFFICIENT ANALYSES OF THE COURTS BELOW AND EFFECT A REMEDY FOR APPELLANT'S FUNDAMENTAL RIGHTS UNDER UNITED STATES CONSTITUTIONAL AMENDMENTS I, IX, XIII AND XIV.

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CASEBOOK

CONSTITUTIONAL LAW, Cases and Materials. Gunther, Gerald. University Casebook Series. The Foundation Press, N.Y. 1975. 12

REFERENCE TO OFFICIAL REPORTS

Lupert v. The California State Bar, et al, 761 F.2d 1325 (1985) 11.18

STATEMENT OF JURISDICTIONAL GROUNDS

The nature of the proceeding was a civil complaint initially commenced in the United States District Court for the Central District of California alleging breach of contract and challenging the constitutionality of California Bus. and Prof. Code Section 6060(g) and its conflict with United States Constitution Amendments I, V, IX, XIII and XIV.

Statutory basis for federal jurisdiction below was U.S.C. Title 42, Section 1983, inter alia.

The date of entry of the Court of Appeals for the Ninth Circuit's affirmance of the District Court's decision, in a separate opinion, was filed on May 28, 1985.

Notice of Appeal to the United States Supreme Court was filed by Appellant on June 21, 1985, alleging the

following statutory provisions to be the basis thereof: Title 28, §§§§ 1253, 2101(a), 2106, and 2403(b).

It is Appellant's belief that the cases cited in TABLE OF AUTHORITIES (supra) are applicable as a supporting authority to the statutes alleged to confer jurisdiction in the instant appeal and they are discussed below.

CONSTITUTIONAL PROVISIONS, STATUTES

California

Article III, Section 5

> "Suits may be brought against the state in such manner and in such courts as shall be directed by law".

United States

Amendment I "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V "...nor be deprived of life, liberty, or property, without due process of law..."

Amendment IX "The enumeration in the Constitution of certain rights SHALL NOT BE CONSTRUED TO DENY OR DISPARAGE OTHERS RETAINED BY THE PEOPLE."

Amendment XIII "Neither slavery nor involuntary servitude, except as a punishment for a crime...shall exist within the United States..."

Amendment XIV "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW, NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

STATUTES:

California

CHAPTER FOUR, SECTION 6060(g), BUS. AND PROF. CODE: "(g) After completion of his first year of law study, have passed a first-year law student's examination given by the examing committee. This requirement shall not apply to a student who satisfactorily

completes the first-year course of instruction in a law school accredited by the examining committee and who either (1) commenced the study of law and registered with the examining committee as provided in subdivision (d) of this section prior to January 1, 1954, or (2) had completed at least two years of college work as defined in this section prior to matriculating in such accredited law school, nor shall this requirement apply to an applicant who has passed the bar examination of a sister state or of a country wherein the common law of England constitutes the basis of jurisprudence. An applicant who is required to take such first-year examination shall not receive credit for his first year of law study until he has passed such examination; nor shall he receive credit for any law study subsequent to the first year, and before he shall have passed such examination, unless for good cause in a particular case the committee decides that credit should be given for such subsequent study or for some part thereof. The examination which the students in their first year of law studies are required to take shall be given twice a year at reasonable intervals.

United States

Title 20 §1221-1, Chapter 31 U.S.C.: "National policy with respect to equal educational opportunities - (Education); Recognizing that the Nation's economic, political and sound security require a well-educated citizenry, the Congress

(1) reaffirms as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers."

Title 28 §1253: "Except as otherwise provide law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

Title 28 §2101(a): "A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court."

Title 28 §2106: The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to

be had as may be just under the circumstances.

Title 28 §2403(b): In any action, suit or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for the argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

Code of Judicial Conduct

Canon 3C(1): "Disqualification. A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer

with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it."

STATEMENT OF THE CASE

Appellant (Plaintiff below) commenced the study of law through an unaccredited correspondence law school located in California while residing in the State of New York. A Thirty-five dollar registration fee required by Appellees of bar candidates was sent to Appellees who in turn mailed a bar registration card to Appellant showing her to be officially registered as a law student with California Appellees. (Complaint, p. 3, beginning at paragraph 6).

As a condition precedent to receiving credit for the first and subsequent years of law study, Appellant was required to take (in California) and pass, an additional bar examination and

pay a required fee of One-hundred-five dollars for such exam, pursuant to California Bus. and Prof. Code, Chapter Four, Section 6060(g). (Supra, p. 3) (Complaint, pp. 1, 4, inter alia.)

This additional requirement is based solely upon the fact that Appellant studies law via a method alternative to the one labled accredited - STATUS of law office study, study with a judge, study at unaccredited class attendance school or through correspondence (each mentioned considered as unaccredited study). The same horn and case books are read, the same principles of law are learned; yet the exam is founded upon the notion that it is the only way that students who study law by an alternative method can appraise their competence to date and determine whether to continue to complete course work for the J.D. in preparation for the

general bar exam of the State. Appellant believes this requirement to be blasphemous to the founding philosophy and way of life here in the United States - Democracy. (The Complaint and entire record in the instant matter repeatedly contend the basic belief of Appellant that her Constitutional rights have been violated.)

And after having taken the required exam, Appellant knows that the implied covenant of good faith has been breached because the multiple choice portion of the exam consisted of a hazy maze where answers to one question were listed among answer choices for another question or were no where to be found in the list of answer choices altogether. (Complaint, p. 4 at paragraph 11.)

Appellant made a good faith effort to reapply to take the exam a second time

but was turned down because of a lack of finances for the required fee. (Complaint p. 5 at paragraph 13.)

Throughout the Court of first instance and on appeal in the Ninth Circuit, the judgment roll shows a consistent presentation with leading supporting authorities of the violations of Appellant's fundamental rights such as the right to commence the study of law in one State and then move to another State to complete such study with the right to expect that no one will do anything to spoil the benefits of the contract to which Appellant is entitled as a matter of fundamental right as guaranteed her by the funadmental rights doctrine of Section 1 of Article XIV of the United States Constitution as enacted by the Congress on July 28, 1868. (The residence cases cited in the Complaint in support thereof.)

The Courts below in separate opinions each ignored Appellant's claims of violations of her fundamental rights labeling them as MOOT or SPECIOUS! (Appendix - D.C. Order, Ninth Circuit Order) Erroneous conclusions of law were cited, non-leading cases all of which amount to nothing more than a personalized biased conglomeration of prejudice - to the rights of a citizen of the United States and to the law of the land itself - life, liberty and the pursuit of happiness under the of the people, by the people and for the people doctrine - our democracy. Appellant is a living human being. Therefore, specious is inapplicable and in view of the fact (as Defunnis dictates) that the relief sought has not been had and that irreparable injury is taking place, the matter can not be held to be moot. The

Ninth's decision must be reversed. (Appeal Brief, p. 2.)

Three of the four who sat below, one in the District Court and two of the three in the Ninth Circuit are former members of the California State Bar who are the Appellees here (Defendants below). A careful reading of the judgment roll of the instant case under the strict scrutiny doctrine as is required when violations of fundamental rights are alleged (Gunther's Constitutional Law) will show this Honorable Court that Appellant's contentions here as below, are meritorious and deserving of the relief she seeks.

REASONS FOR PLENARY CONSIDERATION

> "Under constitutional provision declaring that all men have certain unalienable rights, among which are those of seeking and obtaining happiness and safety, the "pursuit of happiness" is the right to follow or pursue any occupation without restriction and without

> having any burden imposed upon one that is not imposed upon others in a similar situation, and as so construed the constitutional provision is the legal equivalent of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." Myers v. City of Defiance, 36 N.E.2d 162.

Unless this Court can distinguish for Appellant the difference between offer and offer, Palsgraf and Palsgraf, good faith and good faith, Haddonfield v. Baxley and Haddonfield v. Baxley and so on, the Court below must be reversed on grounds that while "We concluded that the States should be left free to "prescribe the qualifications for admission to practice and the standards of professional conduct" (Supreme Court of New Hampshire at Footnote 16), "it creates an irrebutable presumption that only graduates of accredited law schools are fit to practice law, discriminates

against those who have obtained equivalent legal training by other means" (District of Columbia). Therefore, "Whatever various states may require before allowing the taking of bar examinations, so long as they are applicable to EVERY CITIZEN ALIKE, it should be of no concern to the federal courts." In the case at bar, like in District, the rule in question which is a State statute is unconstitutional on its face and must be struck down by reversal in order to effect remedy for Appellant's fundamental rights.

In San Antonio, the Court upheld a statute because it was applicable to ALL students. Good or bad it applied to all 'like citizens'. In Re Griffiths the Court upheld the rights of aliens not to be discriminated against in the admission to practice law here in the United States.

It follows that those of us who are already citizens, born and raised here, reading our Constitutional rights in grammar school cannot be discriminated against by those who assume a heavenly stature and allege to rise above it all and rule the mass. (Griffiths, again.)

Ethical considerations lie at the very core of our legal system.

> "Used in its technical sense, "judicial power" implies the construction of laws and the adjudication of legal rights; it is excused for the purpose of giving effect not to the will of the judge, but to the law." People v. Bruner,

Appellants rights are well established. (District, Hackin, Supreme Court of New Hampshire, Griffiths) (supra). Strict scrutiny is required here, and since the statute is unconstitutional on its face, that should be accomplished in a manner least intrusive upon the Court's time.

The Court has jurisdiction here because the questions presented deal with law already enacted by the State's legislature and Appellant's legal rights as they are intrusively affected by that statute. Prentice v. Atlantic Coast Line, 211 U.S. 210.

And the questions presented at the beginning of this JURISDICTIONAL STATEMENT although filed by and for relief for Appellant constitute, in essence and substance, relief for so many who for too long have been denied just and deserving equal protection of the laws as is their right, just as much as it is Appellant's, to expect in a matter such as this one is.

> "Thus, the Court of Appeals was in error when it ruled that a failure to demonstrate irreparable injury - a traditional prerequisite to injunctive relief, having no equivalent in the law of declaratory judgments - precluded the granting of declaratory relief." Perez v.

Ledesma, 401 U.S. 82.

If the Court were to ask ten law students, each from a different 'school' (i.e. accredited, unaccredited, correspondence, law office, judges chambers - two from each) to define offer or brief Palsgraf, and so on, presuming that the student has done his or her homework, the answers would be the same. In view of the fact that the answers would be the same, how can it be a conclusion of legal reasoning that a student who studies offer and so on in a school of an alternative method be required to take an additional bar exam in order to determine whether the student should continue to pursue the degree? It can not. It only serves to create a stigma of inferiority and this Appellant finds no basis for alleged necessity that concludes to such stigma. Appellant

finds it adverse to democracy upon which the laws of this country happen to be based.

The Court of Appeals for the Ninth Circuit in its opinion at footnote 2 (Appendix A25) stated:

> "There is no basis in law for the argument that the right to pursue one's chosen profession is a fundamental right for the purpose of invoking strict scrutiny under the Equal Protection Clause..."

It is Appellant's belief that she has shown this Court that that decision constitutes a declaration by the Ninth Circuit that the fundamental rights doctrine as enacted by the United States Congress on July 28, 1868, is void.

Appellant has ALLways considered it a fundamental right to her life, liberty and pursuit of happiness to follow her chosen profession and calling,

which of course, is the profession of law. (Amendments I, IX, XIII and XIV.)

Appellant believes that jurisdiction here is established, that plenary consideration is established and that reversal would constitute a proper legal remedy due Appellant in order to avoid irreparable injury.

Respectfully submitted this 3rd of September, 1985.

EILEEN B. COHEN LUPERT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EILEEN B. COHEN LUPERT, Plaintiff, v. THE STATE BAR OF CALIFORNIA, et al., Defendants.	CV 83-2962 WMB

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Filed 12/9/83
Entered 12/12/83

Plaintiff, appearing in pro per, challenges the constitutionality of the First Year Law Students Examination (FYLSX), which attendees of unaccredited California law schools must pass at the end of their first year of study in order to later qualify for the state's general bar exam. The Court finds that the state law implementing the FYLSX, Cal. Bus. and Prof. Code §6060(g), is constitutional.

I. FACTUAL BACKGROUND

Plaintiff is a law student who

recently finished her first year of study at Southland University, an unaccredited correspondence school registered with the Committee of Bar Examiners of the State Bar of California. As an attendee of an unaccredited school plaintiff was required by Cal. Bus. and Prof. Code §6060(g) to take and pass the FYSLX. Plaintiff failed the exam administered in June, 1983.

Plaintiff in her complaint made a variety of allegations against the Board of Governors of the State Bar (Board) and the Committee of Bar Examiners (Committee) and individual defendants, Committee chairman Martin Glick and Board president Anthony Murray. Plaintiff asserted both personalized claims and generalized claims as to the administration of the FYLSX. The Court previously dismissed all personalized claims for

lack of subject matter jurisdiction and dismissed all claims against the Board and the Committee because these entities were found immune under the eleventh amendment. The only remaining claim before the Court is that challenging the constitutionality of section 6060(g) on its face. Defendants now move for summary judgment.[1]

Section 6060(g) was enacted in response to a 1933 bar report entitled Survey of Legal Education and Admission to the Bar in California. Declaration John A. Gorfinkel p3; see, Bib'le v. Committee of Bar Examiners of California, 26 Cal.3d 548, 554 n.6, 606 P.2d 733, 736 n.6, 162 Cal. Rptr. 426, 429, n.6, cert. denied, 449 U.S. 860 (1980). The authors of the report decried a series of recruiting abuses by unaccredited law schools which resulted in many students

attending law school who had no chance of eventually passing the bar examination and becoming lawyers. Exhibit A, Gorfinkel Declaration. The FYLSX was instituted in order to apprise those students attending unaccredited schools of their chances of later becoming lawyers. Defendants submit evidence that the FYLSX serves the same function today. Consultant to the Committee, John A. Gorfinkel, declares that for those law schools denied accreditation since 1968, a major reason for non-accreditation was the schools' willingness "to advance all students, regardless of ability or performance," Gorfinkel Declaration, p9.

II. DISCUSSION

Plaintiff in her complaint asserts violations of the first, fifth, ninth, thirteenth and fourteenth amendments.

The basic thrust of her challenge to section 6060(g) is that the statute impermissibly discriminates between attendees of accredited and unaccredited law schools. Plaintiff argues that the rationale for the exam is outdated and that it creates an unconstitutional discrimination based upon "status" of law students. In focusing upon the statutory discrimination, plaintiff appears to claim a violation of equal protection and the Court will treat it as such.

Plaintiff alleges neither infringement of a fundamental right nor discrimination against a suspect class which would trigger strict scrutiny. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973). With particular reference to qualifications for bar admission, the Supreme Court has held,

"A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 239 (1957). Both state and federal courts have generally subjected bar admission restrictions to rational basis analysis. E.g., Bib'le v. Committee of Bar Examiners of California, 26 Cal.3d, 548, 555, 606 P.2 733, 737, 162 Cal. Rptr. 426, 430 (1980); Hackin v. Lockwood, 361 F.2d 499, 502 (9th Cir.), cert. denied, 385 U.S. 960 (1966). As a result, section 6060(g) retains a "presumption of constitutionality" and to be upheld, defendants need only show "that the distinctions drawn bear some rational

relationship to a conceivable legitimate state purpose." Bib'le, 26 Cal.3d at 555. See, Brandwein v. California Board of Osteopathic Examiners, 708 F.2d 1466, 1470 (9th Cir. 1983).

No genuine issues of material fact remain. The status of plaintiff under state law is undisputed. Nor are there any factual issues with respect to the purposes of section 6060(g) under the constitutional analysis required. Plaintiff at oral argument sought a continuance in order to pursue discovery into the original adoption of the rule mandating the FYLSX, the changing pass rates of students taking the exam over the history of its administration, and the grading system for the exam. Plaintiff also sought to introduce the live testimony of a fellow law student who has attended both accredited and unaccredited

schools to testify as to the lack of difference between the education offered at the two types of institutions. None of these factual matters raised by Plaintiff is relevant to the rational basis analysis required here. To prevail, defendant need not prove the actual basis for the statute, nor its efficacy, but only that the statute has a conceivable basis rationally related to a legitimate governmental purpose. Brandwein, 708 F.2d at 1470-71.

In Brandwein, the Ninth Circuit emphasized the "heavy procedural burden placed on the plaintiff challenging the constitutionality of a state licensing scheme under the rational basis test and noted that the Supreme Court has been "especially deferential to legislative classifications in cases of challenges to the state regulation of licensed professions." Id. at 1470. The Brandwein

court held:

> The plaintiff in a challenge to a legislative classification, reviewed under this standard, must prove that the facts on which the legislature may have relied in shaping the classification "could not reasonably be conceived to be true by the governmental decision-maker." (citation omitted) "The admission that facts are arguable" is enough to justify the legislative judgment. (citation omitted) And in reviewing the rationality of the classification, a court may hypothesize legislative purposes....It is of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." (citation omitted).

Id. at 1470-71.

The California requirement of the FYLSX was challenged in Bib'le. There, the California Supreme Court found, as defendants urge here, that there is a "strong public policy" behind the exam and that the exam "serves a legitimate state interest." 26 Cal.3d at 554, 555. The Court held that the exam,

> both protects persons from continuing to pursue a profession for which they are not qualified, and aids qualified persons in judging the

> quality of the training and education they are receiving in preparation for the bar examination. Not only are these legitimate state interests but there is a rational basis for the different treatment of students receiving instruction at accredited and unaccredited schools because the committee, by setting standards for accreditation, can impose minimum standards on the quality of education at accredited schools.

26 Cal.3d at 555.

The Bib'le holding is consistent with federal decisions in other jurisdictions finding other, more questionable bar restrictions constitutionally justified. In Huffman v. Montana Supreme Court, 372 F.Supp. 1175 (D. Mont.), aff'd, 419 U.S. 955 (1974), for example, the court upheld a Montana law exempting only graduates of the University of Montana law school from taking the state bar exam, finding a rational basis for the exemption. Similarly, in Goldsmith v. Pringle, 399 F. Supp. 620 (D. Colo. 1957), the court found a rational basis for Colorado's bar

admission rule which extended reciprocity to all attorneys except those admitted in Florida and California.

In light of the well-established and legitimate government objective of the FYSLX in apprising students at unaccredited law schools of their changes of becoming lawyers at an early stage in their legal studies and the direct relation between the exam and this purpose, the Court finds section 6060(g) constitutional under the rational basis test.

Based on the above, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment is GRANTED.

Footnote No. 1 Reference Page 2

Plaintiff moves concurrently to strike, for permanent injunction and for judgment with prejudice. In light of the resolution of defendant's motion, however, plaintiff's motions are rendered moot.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES ORDER CV-83-2963-WMB
January 23, 1984.

"Plaintiff is present in pro per and defendants counsel is present. The motion for reconsideration is argued to the Court. The motion is denied. Defendant is to prepare an order."

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed May 23, 1985

EILEEN B. COHEN LUPERT,

Plaintiff-Appellant

vs.

THE CALIFORNIA STATE BAR, et al.,

Defendants-Appellees.

NO. 84-5632

DC# CV 83-2962 WMB

OPINION

Appeal from the United States District Court for the Central District of California District Judge William Matthew Byrne, Jr., Presiding

(Argued and Submitted May 8, 1985 - Pasadena)

Before: WRIGHT, ALARCON and NORRIS, Circuit Judges.
WRIGHT, Circuit Judge:

The only noteworthy issue in this appeal is the constitutionality of California's "Baby Bar" requirement.

Plaintiff raises numerous other issues, including a challenge to the dismissal of the state agencies under the Eleventh Amendment, which we deal with summarily.

FACTS

Eileen B. Cohen Lupert, appearing in propria persona, challenged the constitutionality of section 6060(g) of the California Business and Professions Code. That section requires that students enrolled at schools unaccredited by the Committee of Bar Examiners of the State Bar of California (Committee) must pass the First-Year-Law-Student Examination (FYLSX) before receiving credit for further study. Cal. Bus. & Prof. Code §6060(g) (West Supp. 1985). If a student fails the exam, the Committee may exercise discretion to give credit for subsequent study for "good cause." Id.,

Lupert attended Southern University

an unaccredited correspondence school registered with the Committee. She took an and failed the FYLSX administered in June 1982.

In her complaint, she raised numerous allegations against the State Bar Board of Governors (Board), the Committee, and against the individual defendants, Anthony Murray, then President of the Board, and Martin Glick, then Chairman of the Committee. She asked that section 6060(g) be declared unconstitutional and that defendants be enjoined from administering FYLSX.

The district court dismissed the Board of Governors and the Committee, finding that they were immune from suit under the Eleventh Amendment. On Appeal, Lupert appears to agrue that, because she is a citizen of a state other than California, and because she

does not seek monetary relief, the Eleventh Amendment does not apply.

The Eleventh Amendment bars this suit against the named agencies as the state did not consent to being sued. See Alabama v. Pugh, 438 U.S. 781, 782 (1978). The Eleventh Amendment's prohibition does not extend to prospective, non-monetary injunctive or declaratory relief against state officials. Quern v. Jordan, 440 U.S. 332, 337 (1979); Fisher Foods, Inc. v. Ohio Dept. of Liquor Control, 555 F. Supp. 641, 648 (N.D. Ohio 1982).

ANALYSIS

We review the district court's grant of summary judgment de novo. Frederick Meiswinkel, Inc. v. Laborers' Union Local 261, 744 F.2d 1374, 1376 (9th Cir. 1984), cert. denied, 105 S. Ct. 1394 (1985). The test is whether there is any genuine issue

of material fact and, if not, whether viewing the evidence and permissible inferences in the light most favorable to the adverse party, the movant is entitled to prevail as a matter of law. Operating Engineer Pension Trust v. Beck Engineering & Surveying Co., 746 F.2d 557, 561 (9th Cir. 1984).

The basic thrust of Lupert's numerous constitutional challenges to section 6060(g) is that the statute impermissibly discriminates between those who attend accredited and unaccredited law schools. She argues that the rationale for the examination is outdated and that it unconstitutionally discriminates based on the "status" of law students. The court below treated these claims as an equal protection challenge to the statute.[1]

Plaintiff has shown neither infringement of a fundamental right[2] nor discrim-

ination against a suspect class which would trigger strict scrutiny. See San Antonio Indep. School Dist. v. Rodriguez 411 U.S. 1, 17 (1973); Brandwein v. California Bd. of Osteopathic Examiners, 708 F.2d 1466, 1470 (9th Cir. 1983). State and federal courts generally have subjected state bar admission restrictions to mere rational basis analysis. E.g. Bib'le v. Committee of Bar Examiners 26 Cal. 3d 548, 555, 606 P. 2d 733,737, 162 Cal. Rptr. 426, 430, cert. denied 449 U.S. 860 (1980); see Hackin v. Lockwood, 361 F.2d 499, 502 (9th Cir.) cert. denied, 385 U.S. 960 (1966).

To uphold section 6060(g), we need only find "that the distinctions drawn bear some rational relationship to a conceivable legitimate state purpose." Bible, 26 Cal.3d at 555, 606 P.2d at 737, 162 Cal.Rptr. at 430. See Brandwein

708 F.2d at 1470-71; Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) ("(a) State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.").

According to a consultant to the Committee, the Board instituted the FYLSX in response to a recommendation in a 1933 survey and a recommendation by the Advisory Committee based on that survey. See Bib'le, 26 Cal.3d at 554 n.6, 606 P.2d at 736 n.6, 162 Cal. Rptr., at 429 n.6. The FYLSX was originally instituted to apprise students attending unaccredited schools of their potential for eventually becoming lawyers and to curb recruiting abuses by unaccredited law schools. Id. According to the

Committee's consultant, the Fylsx serves those same purposes today.[3]

Lupert argues that summary judgment is inappropriate where the issue of whether the legal education of law students differed depending on the status of the school is still an open question. This factual issue is not sufficient to defeat the motion for summary judgment. See United States Jaycees v. San Francisco Junior Chamber of Commerce, 513 F.2d 1226, 1226 n.1 (9th Cir. 1975) (must be genuine issue for trial). None of the factual issues raised at trial or on appeal is relevant to the rational basis analysis. We need only examine whether the statute has a conceivable basis rationally related to a legitimate governmental purpose. Brandwein, 708 F.2d at 1470-71

A plaintiff challenging the

constitutionality of a state licensing scheme has a heavy procedural burden under the rational basis test. Brandwein. 708 F.2d at 1470. The Supreme Court is extremely deferential to legislative classifications in actions challenging regulation of licensed professions. See e.g., Williamson v. Lee Optical, 348 U.S. 483, 487-489 (1955); Watson v. Maryland 218 U.S. 173, 177 (1910). See also Ohralik v. State Bar Ass'n. 436 U.S. 447, 460, 98 S. Ct. 1912, 1920-21, 56 L.Ed.2d 444 (1978) (state has special responsibility to maintain standards in the licenced professions). The plaintiff must establish that the facts on which the legislature may have relied could not reasonably have been conceived as true by the governmental decisionmaker. Vance v. Bradley, 440 U.S. 93, 111 (1979).

The California Supreme Court has

found hat a strong public policy underlies the FYLSX exam and that the exam "serves a legitimate state interest." Bib'le, 26 Cal.3d at 554, 555, 606 P.2d at 737, 162 Cal. Rptr. at 429, 430. The exam:

> both protects persons from continuing to pursue a profession for which they are not qualified, and aids qualified persons in judging the qualify of the training and education they are receiving in preparation for the bar examination. Not only are these legitimate state interests but there is a rational basis for the different treatment of students receiving instruction at accredited and unaccredited schools because the committee, by setting standards for accreditation, can impose minimum standards on the qualify of education at accredited. schools.

26 Cal.3d at 555, 606 P.2d at 737, 162 Cal. Rptr. at 430.

The district court found that the Bib'le holding is consistent with other federal courts' decisions ruling on more questionable bar restrictions. See Hoffman v. Montana Supreme Court, 373 F.

372 F.Supp. 1175 (D.Mont.), aff'd 419 U.S. 955 (1974) (Montana law exempting only state law school graduates from taking the state bar exam rational). Goldsmith v. Pringle 399 F. Supp. 620 (D. Colo. 1975) (reciprocity to all lawyers except those admitted in Florida and California rational).

Defendants are entitled to summary dudgment. There are no material factual disputes and, given the well-established and legitimate governmental objective of the FYLSX, section 6060(g) passes the rational basis test.

Plaintiff raises other arguments, We summarily dispose of them here. She had three motions pending before the court when it granted defendants' motion for summary judgment: a motion to strike parts of defendants' answers

to the first amended complaint; a motion for a permanent injunction; and a motion for judgment with prejudice. The court denied all three as moot "(i)n light of the resolution of defendants' motion."

Lupert's argument that the court should have ruled on these motions is specious. Granting the defendants' summary judgment motion disposed of all issues between the parties. The issues were "no longer 'live.'" Pacific Maritime Ass'n v. International Longshoremen's and Warehousemen's Union 454 F.2d 262, 263 (9th Cir. 1971). See also Rosenfeld v. Southern Pacific Co. 444 F.2d 1219, 1221 (9th Cir. 1971) (court without power to give advisory opinions which cannot affect rights of litigants).

All others issues raised on appeal are specious and dismissed. No petition

for rehearing will be entertained.

See Fed. R. App. P. 2.

AFFIRMED.

1/Plaintiff challenges the statute under the First, Fifth, Ninth, Thirteenth and Fourteenth Amendments, as well as under Article I, Section 10 of the Constitution. Like the district court, we treat this as an equal protection challenge. Her other constitutional challenges are specious.

2/There is no basis in law for the argument that the right to pursue one's chosen profession is a fundamental right for the purpose of invoking strict scrutiny under the Equal protection clause. U.S. Const. amend. XIV. Supreme Court of New Hampshire v. Piper, 105 S. Ct. 1272 (1985), is distinguishable because it involved only the Article Four "Privileges and Immunities" Clause, U.S. Const. art. IV, § 2, cl. 1, not the Equal Protection Clause, 105 S. CT. at 1277.

3/In his deposition, the consultant stated that unaccredited schools have "shown a willingness to advance all students, regardless of ability or performance. Were it not for the administration and application of the FYLSX requirement, no student would be disqualified at correspondence schools and few, if any, at the unaccredited resident law schools. Further, "the FYLSX, therefore, is the only means by which students at unaccredited law schools can be assured of a reasonably accurate

appraisal of their progress or lack of progress in the study of law."

Eileen B. Cohen Lupert
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San Gabriel, California 91775

Plaintiff in proper

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed June 21, 1985

UNITED STATES OF AMERICA,

EILEEN B. COHEN LUPERT,

Appellant,

v.

THE CALIFORNIA STATE BAR, ET AL,

Appellees.

C.A. #84-5632
D.C. #CV-83-2962
CENTRAL CALIFORNIA NOTICE OF APPEAL

TO: Magdalene Y. O'Rourke, counsel for Appellees, THE CALIFORNIA STATE BAR, ET AL.

NOTICE IS HEREBY given that EILEEN B. COHEN LUPERT hereby appeals to the United States Supreme Court from 'opinion' filed May 23, 1985 in the above-encaptioned court re the above-styled matter, under 28 U.S.C. §§§§ 1253, 2101(a), 2403(b) and 2106.

DATED: June 19, 1985

/s/
EILEEN B. COHEN LUPERT

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(818) 2864385

Plaintiff in proper

IN THE UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

EILEEN B. COHEN LUPERT,

Appellant,

v.

THE CALIFORNIA STATE BAR, ET AL

APPELLEES.

C.A. #83-5632
D.C. #CV-83-2962
Central California

CERTIFICATE OF SERVICE

EILEEN B.COHEN LUPERT certifies that a copy of the NOTICE OF APPEAL in this action was served on Magdalene Y. O'Rourke, counsel for Appellees at 555 Franklin Street; San Francisco, California 94102 by regular United States Mail on June 19, 1985.

DATED: June 19, 1985

at Pasadena.

/s/
EILEEN B. COHEN LUPERT

IN THE

SUPREME COURT OF THE UNITED STATES

EILEEN B. COHEN LUPERT,

Appellant,

v.

THE CALIFORNIA STATE BAR, ET AL

Appellees.

CERTIFICATE OF SERVICE
OF JURISDICTIONAL STATEMENT

Appellant, EILEEN B. COHEN LUPERT herein certifies that copies of the' JURISDICTIONAL STATEMENT (corrected) in the above entitled cause were mailed as follows: (3) counsel for appellees, Magdalene Y. O'Rourke, 555 Franklin Street, San Francisco, California 94101; (1) Attorney General for the State of California, Sacramento, California; (1) Solicitor General, Department of Justice, Washington, D.C. 20530, via

first class United States Mail on

September 3, 1985, at Pasadena,

California.

Respectfully submitted,

EILEEN B. COHEN LUPERT